FILE COPY

No. 545

Supreme Court of the United States

October Term, 1965

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,
Appellants,

v.

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WALTER C. SCHMIDT, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Appellees.

On Appeal from the Court of Appeals of the State of New York

APPELLANTS' REPLY BRIEF

Herbert Brownell
Thomas F. Daly
25 Broadway
New York, N. Y. 10004
Attorneys for Appellants

Thomas F. Daly
Gerard A. Navagh
Robert B. Haynes
Jack Goodman
Lord, Day & Lord
Of Counsel

INDEX

PAGE

CITATIONS

Cases

Supreme Court of the United States

October Term, 1965

No. 545

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,
Appellants,

v.

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WALTER C. SCHMIDT, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Appellees.

On Appeal from the Court of Appeals of the State of New York

APPELLANTS' REPLY BRIEF

Statement

Before addressing the points raised in appellees' answering brief, appellants would challenge certain assumptions on which appellees base their arguments.

Appellees' Observations Concerning the Genesis of Section 9 of Ch. 531.

From the outset, appellees avoid the rationale and asserted purpose of the enactment of Section 9 of Chap. 531.

In defending the constitutionality of Section 9 of Ch. 531, appellees allege that the occasion for the amendment was a legislative recognition that the liquor industry is not competitive. Drawing upon assertions largely outside the record and so-called 'common knowledge,' appellees would draw a picture of a closely-knit industry, dictating prices at every level of the chain of distribution throughout the country, and bent on using oligopolistic power to charge unjustifiably high prices to New York consumers. The legislature, appellees argue, passed a kind of price-fixing provision in order to give the consumer protection against the economic leverage of the industry.

Although in their brief appellees point to no prior abuses by the industry, they nevertheless attempt to inculcate in the reader a sense of unbridled power which is being recklessly used by this industry. Apparently, appellees wish to suggest—(Appellees' brief at 26)—that, in an industry where there are few companies which account for as much as 60 per cent of the total industry business, there is *ipso facto* justification for imposing maximum price limitations upon such an industry.

Thus, by this illogical process, appellees would be willing to argue that because there are three or four domestic auto manufacturers which control virtually 100 per cent of the business they, too, are within the ambit of state legislative power, and their maximum prices could also be set by the state in the exercise of its police power, without any regard to normal competitive and marketing demands in the diverse markets in this country. This illustration only serves to emphasize that the maximum price provisions here can find no justification by referring to problems peculiar to the alcoholic beverage trade; if these provisions are constitutional as ap-

plied to liquor, they are constitutional as applied to any commodity one cares to name. Since the promotion of temperance is not served by Section 9, it must be judged as would any other act seeking to restrict unjustly the right of one to set his price in response to competitive demands.

It is suggested on page 56 of appellees' brief that appellant-distillers and wholesalers have been conspiring to charge a uniform "high" price to purchasers in New York. Appellees assert that "the free enterprise for which appellants argue so vehemently in their brief has not in this industry operated in New York State." (Appellees' brief at 57). They support this finding, which would surely invoke federal and state antitrust laws if true, by referring to the wholesale prices of several brands of liquor for certain months, which were found to be identical as among the wholesalers selling such brands. Identical pricing between competitors selling several brands is determined by appellees to be conclusive proof that free enterprise is not operating in the entire market. Mere parallel pricing is not deemed a violation of antitrust law by federal courts. See *Theatre Enterprises, Inc.* v. *Paramount Film Dist. Corp.*, 346 U. S. 537, 541 (1954).

Furthermore, appellees rely upon these quoted prices for the assertion that they are "high" prices and thus evidence the need for the enactment of Section 9. How does one determine that a price is high, low or economically right by observing the price in a vacuum? No affidavits or economic studies support appellees' assertion, yet this court is supposed to accept this statement that the price is "high" as justification for upholding a legislative act which is not only contrary to the terms of the Sherman, Donnelly, and Robinson-Patman Acts, but which certainly

finds no justification by the State's power to protect the public health, safety and welfare. (See discussion, *infra.*)

Assuming, arguendo, that the industry is anything but competitive—which appellants stoutly deny, nowhere do appellees explain why New York should have been singled out by the entire industry for discriminatory high prices. Appellees' argument is self-contradictory: if anti-competitive prices were due to the structure of the industry, then such prices should have been higher throughout the country.

If, local economic conditions apart, wholesalers' prices or retailers' prices in New York were higher than prevailing prices in certain other markets, as appellees' one responsible source—the Moreland Commission report—suggests, the Moreland Commission itself ascribed the reason to, and urged the repeal of, the system of resale price maintenance required by New York statute up to 1964. Its "Conclusions and Recommendations" were, in part, as follows:

"A. **Conclusions**

"For all of the foregoing reasons we have concluded that Section 101-c injures the New York consumer in at least three important ways:

> "1. It causes New Yorkers to pay about $1.00 a fifth more for liquor than consumers in areas of the country which do not have mandatory resale price maintenance.
>
> "2. It eliminates competition and deprives the New York consumer of the benefits of free market efficiency.
>
> "3. It places price-fixing power in the exclusive hands of the distillers, the group having the largest self-interest to serve, an extraordinary power which

the State should be reluctant to grant any private group, even a disinterested one.

"We also find:

"1. Compulsory resale price maintenance enforced by the State has no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol.

"2. The repeal of this system will not create law enforcement problems with which the State is unable to deal.

"B. **Recommendations**

"We make the following recommendations:

"1. Section 101-c of the ABC Law, which provides for SLA enforcement of minimum consumer resale prices fixed by the distillers, should be repealed.

"2. Although we believe that State enforcement of distiller-fixed consumer prices is completely unjustified, we recognize that its elimination represents a radical change which, when combined with the elimination of the restrictive licensing of package stores, may well have an impact on the industry and especially on some of the small retail package stores. But the interests of the consuming public must be paramount, so that the possible effect on the industry does not support the retention of this unjustified law. This is particularly true since it still will be possible for the distillers, like manufacturers of other branded products, to make private resale price maintenance arrangements under the Feld-Crawford Act." (R. at 157.)

The Governor, in his original message to the Legislature, cited the Moreland Commission Report for the following findings:

"Such a compulsory resale price maintenance is at war with the American system of free competition.

> The result is that New York consumers have been compelled to pay on the average $1 more per fifth of liquor than they would have to pay if there were a free market. This price difference is not explained by differences in excise taxes, fees and retail operating costs. The total bill for this surcharge foisted on New Yorkers now runs to $150 million a year and it is rising every year.
>
> This present system of price control has no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol." (R. at 188)

It is worth noting that the Moreland Commission Report made no findings that distillers charge higher prices to wholesalers in New York than they charge to wholesalers in other states.

New York wholesaler prices may well be higher than wholesaler, or even retailer, prices in other markets, if distribution costs are generally higher in New York than in some other geographically concentrated market, such as the District of Columbia. Thus, New York wholesaler prices might well be higher without any form of fair trade legislation.

Nor is there, as appellees suggest, anything sinister about continued fair trade pricing by some distillers in New York. In repealing Section 101(c) to bring prices down, and enacting Section 9 to force prices to stay low, the new legislation left the general New York Fair Trade law—the Feld-Crawford Act—applicable to liquor. Many retailers strongly favor fair trade. So do some liquor retailers. Some distillers continue to follow the option to fair trade liquor. This is simply the exercise of the same option that New York law gives manufacturers of branded

articles generally. If there is an inconsistency between enacting a law to promote fundamental principles of price competition and, at the same time, retaining a state fair trade law, the inconsistency can hardly be charged to distillers and wholesalers of liquor in New York.

In any event, judged by the plethora of fair-trade litigation brought by the liquor industry now pending in the courts of New York, the prediction of the Moreland Act Commission (R. pp. 110-111) that "Since some distillers fair-trade their products wherever possible under duress of retailers, one can view general fair-trade as a temporary obstacle to open price competition rather than an impregnable barrier to it," would appear to be borne out.

If mandatory resale price maintenance had simply been repealed—which the Moreland Commission advocated, which the Governor first sought—unsuccessfully, and which appellants do not challenge, prices in New York would be influenced—the general New York Fair Trade statute apart—by free market conditions. (See the Conclusion of the Moreland Commission, R. at 110-111). An appendage to a statute passed solely to promote temperance, having been found quite unrelated to temperance, would have simply been excised. Because New York, at the wholesale and retail levels of the liquor trade, is a separate market, insulated by state regulation from the rest of the national economy, competitive conditions might dictate wholesale and retail prices about the same, somewhat higher or somewhat lower than prices which had previously obtained under mandatory resale price maintenance.

But the legislature went further and enacted Section 9. The purpose of Section 9 of Ch. 531, as announced in

Section 8, was not to grant lower liquor prices to New York purchasers—the repeal of Section 101-c, again, as pointed out by the Moreland Act Commission, would achieve that. It was, as Section 8 proclaims, to ensure that the removal of mandatory resale price maintenance would not be frustrated by possible future "monopolistic and anti-competitive practices." In other words, Section 9 of Ch. 531 is (whether appellees wish to use the term or not) antitrust legislation designed to thwart possible future practices which the legislature felt might be exercised in an attempt to frustrate the return to a free market in liquor through the repeal of mandatory resale price maintenance.

The constitutionality of Section 9 must be decided in light of this plainly announced legislative purpose.

Although the New York lower courts and the majority of the Court of Appeals chose to dispose of the issues here on the usual presumption of constitutionality and the broad power of a state to regulate prices generally under the police power and liquor in particular, by virtue of the 21st amendment, the Supreme Court is not bound, where state statutes affect interstate commerce, by such a presumption or by the label affixed by the state court, in determining whether the claims of state regulation would burden commerce unduly or impinge on a federal policy held to require national consistency. *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 767 n. 2 (1945).

Appellees contend that there is only one question before the Court: may New York require compliance with Section 9? This reply will be limited to considering the points raised by appellees on this question.

POINT I

Appellees argue here* that Section 9 of Ch. 531 is "an internal regulation" of the liquor industry "within the borders of New York State," an enactment constitutionally within the state's regulatory power under the 21st Amendment. Preliminarily, it will be noted that were the Section simply an internal regulation, appellees would have no possible recourse to the 21st Amendment. The 21st Amendment is not an alternative source of state police power with regard to regulating liquor. It simply withdraws the Commerce Clause as a bar to an otherwise valid state statute related uniquely to temperance. Only if the state regulation does impinge upon interstate commerce in alcoholic beverages, does the 21st Amendment come into play. But how relevant is the 21st Amendment here? Section 9 was not enacted to promote temperance. If Section 9, weighed against its announced purpose, is a valid regulation of liquor, the same regulatory approach should be equally valid for a state to adopt, on the same announced purpose, for any other commodity.

Section 9, as Section 8 makes explicit, does not pretend to protect the public from problems uniquely associated with temperance but is instead an economic act designed to guard against possible future anti-competitive conduct; Section 9, therefore, cannot wear the mantle of the 21st Amend-

---

* Against appellees' contention here that *California* v. *Washington,* 358 U. S. 64 (1958) and cases cited in the Court's *per curiam* opinion, "deny appellants' essential position that State liquor legislation must affirmatively promote temperance to come within the Twenty-first Amendment," should be contrasted with the following excerpt from the Brief of the State of New York Amicus Curiae In Support of Complaint in *California* v. *Washington, supra*:

> "We have found no case extending the protection of the Twenty-first Amendment to a statute adopted from economic motivations alone." (p. 11)

ment. Any power which the State of New York may have to regulate the price of liquor in order to bring about the "fundamental principles of price competition" and "to forestall possible monopolistic and anticompetitive practices" is derived simply from the police power. State regulation unrelated to coping with the peculiar problems of temperance but which is merely directed toward reducing the prevailing price level for alcoholic beverages is as much subject to the Commerce Clause as would be similar regulation involving any other commodity. Conversely, for state legislation to enjoy the protective mantle of the 21st Amendment, as against conflicting federal legislation or the Commerce Clause, the regulation must have some reasonable connection, however indirect, with the promotion of temperance. In appellants' view, therefore, the 21st Amendment is simply irrelevant. Appellees virtually concede as much in arguing that if some commodity other than liquor—"bicycles, cosmetics, or furniture," were involved, the regulation would still be valid.

Is Section 9 simply "an internal regulation" of the liquor industry "within the borders of New York State"? In terms of its operation, the statute is not simply an internal regulation of the state: it delegates, in the name of state regulation, the power to determine the wholesale price in New York to a random "related person" wholesaler somewhere in the United States. The statute is directed precisely towards tying prices within New York to the lowest price outside of the state. What New York has done is to renounce any peculiarly local solution. In flat contradiction of its announced rationale, in operation Section 9 evidently seeks to compel the New York wholesalers to follow the most depressed market conditions facing any related person wholesaler in the United States—whether brought about by chronic price wars, surplus stocks or any other rea-

son—all purportedly in order to benefit the New York consumer.

But, in terms of effect, it is very likely, as the majority of the Court of Appeals blandly recognized, to cause an increase in prices across the country.

Again, while the 21st Amendment gives New York the power to bar liquor from its borders and confirms its wide discretion to regulate liquor within its borders, it gives New York no power to regulate beyond its borders, to legislate extraterritorially. *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945). Not even Mr. Justice Frankfurter's concurrence, much relied upon by appellees although the *Frankfort* majority expressly declined to follow him, went so far. And see *Nippert* v. *City of Richmond*, 327 U.S. 416, 425n.15 (1946).

Even when Congress has denominated a subject as peculiarly appropriate to local regulation and expressly delegates broad power to the States to enact economic regulation and tax as it has with regard to the insurance industry under the McCarran-Ferguson Act, where the argument has been made that state regulation has precluded any form of federal regulation irrespective of interstate consequences, the courts have rejected it. *F. T. C.* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960) (Section 2(b) of the McCarran-Ferguson Act does not oust Federal Trade Commission jurisdiction, where the practices of the insurance company took effect outside the borders of a state). See *In re Grand Jury Investigation of the Aviation Insurance Industry*, 183 F. Supp. 374 (S.D.N.Y. 1960); *U.S.* v. *Chicago Title & Trust Co.*, 242 F. Supp. 56 (N.D.Ill. 1965). The 21st Amendment cannot be used to insulate Section 9 from conflict with other constitutional provisions

or conflicting federal statutes. To hold otherwise would allow a state to contravene any federal act at will as long as the object of the state law—regardless of the problem to which it is addressed—is the liquor industry. See *Jatros v. Bowles*, 143 F.2d 453, 455 (6th Cir. 1944). Were the result otherwise, our federal system would simply break down.

POINT II

There is no quarrel here with the general proposition that control of the maximum price of virtually any commodity may, under sufficient circumstances, be a proper exercise of the police power. If the legislature were persuaded that effective regulation of liquor consumption required complete control of liquor distribution, New York could properly undertake the distribution and sale of alcoholic beverages itself, set its own prices, and take a middleman's fee or not, as it saw fit. But so long as New York permits the distribution and sale of liquor to remain in private hands, those engaged in the business are entitled to constitutional guarantees, including due process. Appellants challenge the view of the majority of the Court of Appeals, cited by appellees, characterizing those engaged in the liquor industry as somehow stained and entitled only to second-class citizenship:

> "A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who choose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics, or furniture." R. at 346.

It is true that in recent years the Supreme Court has been most reluctant to strike down a state statute on substantive due process grounds where there is any possible connection between the requirements of the statute and its announced purpose. But even the limited inquiry which, under prevailing opinions, the Supreme Court will undertake, must bring into question the rationality of this state economic regulation. To appellants, it requires no major intellectual expedition to doubt a connection between ends and means here: to ask the question in the various forms in which it may be posed, is to answer it.

Does this legislation have any rational basis? Is it "substantially related to a legitimate end sought to be obtained"?* The sole police power rationale of the New York ABC law, as set forth in Section 2 of that law, makes it clear that it is the policy of New York to regulate alcoholic beverages "for the purpose of fostering and promoting temperance . . . and respect for and obedience to the law." Does Section 9 promote temperance?

The majority of the Court of Appeals upheld the amendment as a valid exercise of the police power, on the ground that the legislature presumably felt it was a temperance measure, and the majority preferred to take the legislature's—unstated—word for it rather than appellants' 'prejudiced' arguments. To appellants' simple observation that if high prices do not encourage temperance, low prices would hardly be expected to either, the majority replied:

> "Throughout the argument of plaintiffs on constitutional and other issues runs the thread of their contention that the 1964 statute is not suited to the

* *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U.S. 179, 186 (1950).

promotion of temperance and hence the main justification of a valid regulation of liquor is lost.

"In summarizing their position in a reply brief plaintiffs say: 'At issue here is whether Section 9 of Ch. 531 affirmatively promotes temperance.' As to what best promotes temperance among the people of New York it seems preferable to take the opinion of the Governor and the Legislature rather than that of the liquor industry." R. at 350.

The minority of the Court of Appeals had no such difficulty in recognizing the obvious:

" . . . It comes down to this: mandatory establishing of minimum prices for sales by bottle or case of 'brand name' alcoholic beverages is beyond the power of our State legislation, is an unconstitutional (U. S. Const., 5th and 14th Amdts.; N. Y. Const., art. 1, §6) taking of private property without due process or compensation, and is not justified as a police power exercise *since it is not necessary for or related to the health, safety, morals or welfare of the State's inhabitants or required by any emergency.*

* * * * *

" . . . No one has yet told us how any of these lawful purposes could be accomplished or furthered by forcing liquor prices down to the bottom level found anywhere in the United States. To promote temperance by making intoxicants cheaper is like trying to minimize the dangers of excessive smoking by abolishing cigarette taxes.

* * * * *

"It is suggested that we should respect and accept the judgment of the Legislature and the Governor that price limitation will further temperance. But the assumption that such was the purpose runs against the declared fact. Neither the Governor nor the Legis-

lature ever offered such a vain argument, and we must remember that sections 7 and 9 were not among the recommendations of the distinguished Moreland Act Commissioners appointed by the Governor. Temperance is a laudable objective and a proper State purpose but no one has the temerity to assert that cut-price liquor cuts down drinking. Therefore, it follows of absolute necessity that these amendments have nothing to do with the State policy written into section 2 of the State Alcoholic Beverage Control Law right after repeal of National Prohibition 'to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law.'" [*Emphasis* supplied] R. 350-3.

Appellees rely on the general proposition that "Our statute is under New York's police power for the benefit of all the people" [sic]. (Appellees' Brief, p. 50.) Yet appellees never come to grips with Section 2 of the ABC Law and Section 101-b of the same law, which declare that the promotion of temperance is the goal of liquor regulation. Appellees' disregard of these sections leads one to ask: How does a legislatively mandated low price distilled liquor affirmatively serve the general public? The police power is phrased in terms of an affirmative improvement of the health, safety and welfare of the community. A law impinging on the rights of private property cannot be upheld merely because it does no *harm* to the public health, safety or welfare.

Does Section 9 apply fundamental principles of price competition to the sale of liquor in New York? It is an elementary principle of economic theory that prices should reflect the balance of demand and supply in a given market, from moment to moment. What can a bizarre price ceiling

dictated by conditions in some other market two months previously and rigidly imposed for a period of a month in New York, have to do with this principle? The fundamental principles of price competition do not dictate any particular level of prices, least of all the lowest of the low arrived at in some quite different market. If liquor price control is a permissible exercise of the state police power on any assumption, it certainly cannot be justified in the name of "fundamental principles of price competition." The mechanism adopted flatly contradicts the principle invoked: the baby is thrown out with the bathwater.

Appellees' argument is laced with emotive references to economic "menaces" as exemplified by supposedly discriminatory prices charged by wholesalers and retainers in New York as compared with the District of Columbia, for example. But is it so very astonishing that different markets should have experienced different prices, particularly where resale price maintenance was required by one jurisdiction and the other has no fair trade law?

Is the end to forestall possible anticompetitive practices? The record being barren of any legislative study of possible anticompetitive threats, appellees rely on academic studies of some vintage to supply the occasion for such regulation. But the notion that the "industry" has been discriminating—or may at some future date discriminate—against New York consumers is unexplained. Why New York? Should such discrimination occur, why not enforce the Donnelly Act or complain to the federal enforcement agencies, if, as intimated, collusive practices are so notorious in the New York liquor industry alone as to raise prices by a hundred million dollars a year or more?

Mandatory resale price maintenance did, to be sure, conflict with fundamental principles of price competition. But how a price-fixing requirement can be defended as designed to promote the fundamental principles of price competition or to prevent anticompetitive practices is curious.

There is nothing in the record to suggest that profits to any segment of the liquor industry—distiller, wholesaler or retailer—from sales in New York are abnormal. Quite the contrary, the record shows that costs in New York are higher than elsewhere in the country and profit margins of New York wholesalers and retailers are very low.

Appellees' attempt to dispose of appellants' real concern that the statute is intolerably vague, has been met by appellants' main brief. Any occasional difficulties in compliance, appellees imply, will be settled by the State Liquor Authority. (Appellees' Brief, pp. 59-60.) An unguaranteed offer of amnesty cannot cure an unconstitutional statute. This suggestion is rendered even more venal when one recalls that it was allegations of scandal arising from abuses of discretion by the State Liquor Authority in ruling on retail liquor license applications that led to the appointment of the Moreland Commission.

POINT III

Conscious of the weakness of attempting to justify Section 9 on the extravagant argument that, the commodity regulated being liquor, the 21st Amendment simply removes such regulation from judicial scrutiny, appellees finally address the central issue in this case, arguing that this regulation would be equally constitutional were it directed at a commodity other than liquor: it does not, they

assert, burden interstate commerce unduly; there is no supremacy clause problem because the Sherman and Robinson-Patman Acts involve other subjects, directed towards other remedial goals.

Supremacy Clause

Appellees claim that Section 9 of Ch. 531, requiring distillers and "related person" wholesalers to charge a price in New York no higher than the lowest price charged elsewhere, is not an antitrust act. They claim appellants merely deem it so and that this labeling by appellants cannot support a challenge that Section 9 of Ch. 531 conflicts with federal antitrust laws in contravention of the supremacy clause of the federal constitution, Article VI.

Thus, appellees would limit the absolute power of the supremacy clause to invalidate state statutes in conflict with federal statutes only to cases where the state statute demonstrably has the same primary goal as the offended federal statute. Under appellees' analysis, the fact that those attempting to comply with the state statute would have their rights under a federal statute reduced, or would be required to do more than the federal statute requires, is not germane.

Appellees' contention is in error on several counts. First, the legislative purpose of the act as set forth in Section 8 of Ch. 531 deems the requirements of Section 9 to be necessary "to forestall possible monopolistic and anti-competitive practices." Could an antitrust rationale be stated much more clearly?

Although the issue has not in all respects been conclusively settled with respect to antitrust legislation, it seems that Congress has not preempted the field. Rather

a dual—but consistent—system of enforcement, federal and state, is called for.

Conceding that a conflict should not be sought where none clearly exists, appellants believe that appellees misapply, if they do not misconceive, the test of a conflict with a paramount federal pronouncement sufficient to invalidate a contradictory state statute. To be sure there must be some identity of the matter being subjected to different rules. There is here. But appellees contend that the remedial goals are different, as if the question could be disposed of so readily.* Are the goals of the Sherman Act so different from a state statute invoking the "fundamental principles of price competition" and expressly intended to guard against possible anticompetitive practices? Are the 'respective' goals more different than they were in

Northern Securities Co. v. *United States,* 193 U. S. 197 (1904) (liberal state incorporation laws no bar to federal antitrust suit)?

United States v. *South-Eastern Underwriters Ass'n,* 322 U. S. 533 (1944) (state regulations designed to prevent competition in the insurance industry as harmful to insured and insurers, no bar to Sherman Act prosecution)?

Schwegmann Bros. v. *Calvert Distillers Corp.,* 341 U. S. 384 (1951) (non-signer clause of state fair trade statute

* Furthermore, labels are not determinative in this issue. Regardless of what the maximum pricing requirements of Section 9 of Ch. 531 are called, the only issue to be resolved is whether they in fact impinge upon the terms or policy of federal acts. In this case, as appellants have demonstrated, they conflict with the terms and policy of federal antitrust acts. If they contradicted federal acts dealing with other subjects, they would be just as invalid.

unenforcible as beyond the limited Miller-Tydings' exemption to the Sherman Act)?

Cf. Local 24, International Brotherhood of Teamsters v. *Oliver,* 358 U. S. 283 (1959) (conduct prohibited by state antitrust law excused by paramount national labor relations policy)?

Cf. State v. *Texaco, Inc.,* 14 Wis. 2d 625, 111 N.W. 2d 918 (1961) (recognizing possibility of conflict between state pricing prohibition and conduct permitted by Robinson-Patman Act)?

As for the relevance of a given price level to antitrust policy, it was early contended that a restraint on the price mechanism should be open to defense on the ground that the result was reasonable, that the prices were only fair, and that the public suffered no injury. The courts soon declined to follow the rule of reason so far. The reasonable price of today might be unreasonable tomorrow, even if it were feasible to pass judgment on the reasonableness of the price today. Rather than set sail upon such a sea of doubt, the courts preferred to place a *per se* ban on collusive tinkering with prices.

> *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271, 293 (6th Cir. 1898) (per Taft, Circuit Judge), aff'd 175 U.S. 211 (1899):

> "It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in pay territory were reasonable. A great many affidavits of purchasers of pipe in pay territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been

reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so."

United States v. *Trenton Potteries Co.,* 273 U.S. 392, 396-98(1927):

"That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this Court in the *Standard Oil* and *Tobacco* cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable . . .

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legis-

> lation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable — a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."

If the underlying philosophy of the federal antitrust laws is indifferent to the "reasonableness" of prices, still less does it insist that prices be no higher than the lowest in some unrelated market.* The Sherman Act is concerned only with the structural conditions of which a peculiar price pattern may be some evidence, and the conduct by which a price was arrived at.

This is not the occasion for the Court to pass upon the degree of workable competition in the liquor industry. In view of the maze of regulation and unique sumptuary imposts at both the federal and state levels such an inquiry would be more academic than anything else. There may well be industries which, in terms of structure, conduct and performance, may be characterized as likely to be more competitive than the liquor industry. Equally there may be a number of important industries which, by the same standards, should be characterized as less likely to be competitive than the liquor industry. Whatever the degree of competition in the liquor industry, Section 9 will do nothing to increase it.

---

* For an analysis of the fallacy—both in economic and legal terms—that competition is measured or enhanced by compulsory price reductions, compare Statement of Professor Eugene V. Rostow Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, Concerning S. 1552 (December 7, 1961), 6 Antitrust Bulletin 606, 617-20 (1961).

By the standards of "workable competition"*, which the federal antitrust laws seek to perpetuate, what are the likely incidences of this amendment?

(1) There is likely to be less price competition (as well as less non-price competition in the form of advertising, etc.) between distillers, which will of course tend to make present market positions semi-permanent.

(2) There is likely to be some squeeze on the number of wholesalers in New York—and therefore fewer alternative channels of distribution for the smaller distillers, in particular, and correspondingly, fewer alternative sources of supply for New York retailers.

(3) The wholesaler in New York will be guided by someone else's profit and loss experiences.

(4) Any incentive for new entry at the wholesale level in New York would disappear.

(5) The retailer will tend to be benefited—relatively speaking, and the wholesaler penalized, by considerations which price competition cannot justify.

(6) The plight of New York wholesalers might well induce efforts to mitigate the full force of the amendment —which would require collusion between a distiller and its respective wholesalers across the country.

Neither in approach nor in likely consequence is there any compatability between Section 9 and the basic federal antitrust statute, the Sherman Act. Indeed, compliance will invite conduct very much at odds with the standards of the Sherman Act.

---

* E.g. Edwards, *Maintaining Competition* 9-10.

Appellees argue that the New York statute does not conflict with the Sherman Act because the New York statute does not act upon monopolistic and anticompetitive practices between competitors and the Sherman Act does. But the Sherman Act is concerned, and very much so, with restraints on distribution as between a manufacturer and his wholesale and retail distributors. The artificial relationships called for by the New York statute are wholly at variance with the policy, and call for conduct contradictory to, the mandates of the Sherman Act.

In order to comply with the requirements of the New York law a seller must perform certain activities quite incompatible with federal antitrust law:

(1) Every brand-owner distiller who wishes to sell within New York as well as in other states, must develop a network of communication for the monthly gathering of pricing statistics from "related person" wholesalers for the explicit purpose of informing New York wholesalers what future prices to fix.

(2) Faced with a "related person" wholesaler unwilling to divulge his lowest prices, the brand owner must either coerce this information from the wholesaler or face foreclosure of his brands for a month from the largest single market in the country.

(3) In negotiating prices with buyers in other states and the District of Columbia, the distiller must weigh the effect of such a price upon the price of the same brand in New York, with the inevitable tendency to set prices at artificially higher levels outside New York in an attempt to balance the effects of such prices within New York.

(4) New York wholesalers, especially the smaller ones, when forced to price at a level no higher than the lowest price in any other state or the District of

Columbia, and reflecting "all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler"—irrespective of their own higher labor and operating costs, will press the distillers to police wholesaler prices in other states to prevent the bankruptcy of their New York kin. The only effective means to police a "cut-rate" wholesaler is to threaten to refuse him further supplies or actually drop him and restore him as a wholesaler only upon an undertaking not to price below the level suggested.

When appellees dismiss, with the wave of the hand, appellants' concern that the collection of information from across the country in order to fix prices in New York could be regarded as contrary to the Sherman Act on the grounds that trade associations are constantly doing just this, they—and any such trade associations—ignore classic warnings of this Court regarding joint activities affecting prices outside the narrow confines of the fair trade exemption.

But the real issue is not so much a question of liability to antitrust prosecution, but rather the most serious kind of conflict* between a bizarre state regulatory scheme and paramount federal law as interpreted for the better part of 70 years. Not only does the New York law engender

---

* Compare the following from the brief of the United States as *Amicus Curiae* in *Schwegmann Bros* v. *Calvert Distillers Corp., op. cit., supra*:

"It may be argued that the only action complained of here is the action of the state in enacting the non-signer clause. That argument misconceives the issue. The state is not charged with violating the Sherman Act. The question is whether respondents may secure enforcement of a state law which purports to forbid price competition in an area where valid federal legislation has decreed its maintenance.[4] The problem is not one

and promote activities which are associated with forbidden conspiracies and which actually constitute proscribed contracts, combinations and conspiracies—the statute goes further; it kills the whole spirit of the Sherman Act. As stated by Mr. Justice Black in *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4 (1958) the Sherman Act was designed as a

> "... charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress ..."

The New York law flies in the face of this concept.

---

of application of the Sherman Act to a state, but of application of the Supremacy Clause of the Constitution to a state statute in a field of interstate commerce which Congress has occupied. This Court has said that 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it * * *.' *Parker* v. *Brown,* 317 U.S. 341, 351.[5] Here, Louisiana seeks to force adherence by all retailers to a price schedule promulgated by private persons. Apart from any exemptions created by the Miller-Tydings Act, state law thus thwarts the rule laid down by Congress, since voluntary adherence to such price schedule with knowledge of like adherence by others would violate the Sherman Act. *Interstate Circuit* v. *United States,* 306 U.S. 208."

4. Even absent an express conflict, a state statute cannot survive which 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz,* 312 U.S. 52, 67.

5. Cf. *Northern Securities Co. v. United States,* 193 U.S. 197, 345-346: 'No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce.'" (pp. 7-8).

What, then, of the argument that New York may be concerned with restraints which have not yet matured into sufficient evils to be cognizable under the federal laws? Nothing in the record, or indeed nothing which appellees seek to invoke outside the record, indicates that whatever imperfections or blemishes the liquor industry might reveal, lie wholly beyond the reach of the paramount federal statutes of general applicability. Section 5 of the Federal Trade Commission Act may reach potential Clayton and Sherman Act violations in their incipiency. See *FTC* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 394-5 (1953).

Next, appellees attempt to show that certain other provisions of the New York ABC Law can also be said to be violative of the Sherman Act. But these provisions arguably promote temperance and would, unlike Section 9, therefore be protected by ~~the 21st~~ Amendment. Moreover, whether other sections of the ABC Law also violate the Sherman Act is hardly relevant when an action is brought testing the compatability of Section 9 of Ch. 531 with these federal acts.

As to appellees' assertion that Section 9 is utterly unrelated to the Robinson-Patman Act and, therefore, there can be no issue of conflict, appellees misconceive the question: the Robinson-Patman Act permits discounts to be given in certain circumstances. This right is denied to appellants by Section 9.

Nor is it any answer to argue that if appellants' Robinson-Patman Act argument is sound, New York has for 22 years been violating that Act. Suffice it to say that prior to 1964 the regulations of the State of New York banning price discrimination were premised on being in furtherance of temperance and, therefore, protected under the 21st Amendment against challenge under the com-

merce clause or from statutes deriving their authority from the power of Congress to regulate commerce under the commerce clause. Moreover, such price regulations had no direct impact outside the State of New York.

To say that because Section 9 is concerned with a distiller's own prices—in complete disregard of competitors' prices — and not, as is the Robinson-Patman Act, with a distiller's prices vis-a-vis those of his competitors' (Appellees' brief, at 74), and therefore there is no conflict, overlooks the essential point of the "meeting competition" defense in subsection (b) of the Robinson-Patman Act: a seller should—indeed, must—consider his competitor's prices and the Robinson-Patman Act so permits him. But, again, in the name of forestalling possible anticompetitive practice, the New York statute forbids it. It is elementary that a state statute which condemns what federal statutes permit, must fall.

Appellees contend that if Section 9 conflicts with the Robinson-Patman Act, so do the control states by their resort to warranties (Appellees' Brief p. 74). In appellants' view this case does not require the Court to pass on the peculiar status of those warranties.

The undertaking called for by the so-called control states' warranties is clearly distinguishable from the dictates of Section 9: it is merely contractual and carries no penal sanctions. By contrast, under Section 9 the control of the wholesale price to be charged lies in the hands of any "related person" wholesaler—over whom, typically, neither the distiller nor a New York wholesaler has any legitimate control. It is the essence of the scheme of regulation employed by the so-called control states that the states themselves have gone into the business of distributing and

selling liquor. The weight of authority is to the effect that the Robinson-Patman Act does not apply to transactions with states or state agencies. *E.g. Sachs* v. *Brown-Forman Distillers Corp.,* 134 F.Supp. 9, 16 (S.D.N.Y. 1955) *aff'd per curiam* 234 F.2d 959 (2d Cir. 1956), *cert. denied,* 352 U.S. 925 (1956). See Rowe, *Price Discrimination Under the Robinson-Patman Act* 84-5 (1962).

That is not to say that a state may not under certain circumstances completely renounce the competitive model as a guide for the sale of alcoholic beverages within its borders and simply fix the prices at which such business shall be conducted. But here the state has not done so. Leaving the distribution of liquor in private hands, it delegates the pricing decision to out-of-state sources to determine what price shall be the lowest of the low, whatever the reasons.

Appellees argue that even though the terms or policy of the Robinson-Patman Act may be violated, such conflict is justified because New Yorkers were discriminated against by distillers and wholesalers in the past, and other laws have also violated the Robinson-Patman Act. Obviously, without regard to the truth of these assertions — which appellants have shown to be without foundation — such contentions are irrelevant when appellants bring before this court evidence that Section 9 of the Ch. 531 is in conflict with the Robinson-Patman Act.

Once it has been shown that the terms of Section 9 of Ch. 531 are in conflict with the terms and policy of the Sherman and Robinson-Patman Acts inquiry is at an end. A violation of the supremacy clause occurring, a court is bound to strike the offending state legislation.

Interstate Commerce

Appellants have no general quarrel with appellees' statement that proper state action may have repercussions beyond state lines. But to say that where Congress has not acted and where the nature of the regulation requires no uniform national approach the fact that state action may have repercussions beyond state lines does not *per se* invalidate state law, only begs the question as to whether or not Congress has acted. See the discussion of the Supremacy Clause issue, *supra.*

The test of a state's wide latitude to experiment with different approaches to matters of essentially local concern, has been stated in a variety of ways but may be fairly summarized thus: if there is some effect on commerce, the burden of that effect on the national economy will be weighed against the hoped-for benefit at the local level. If the likely burden outweighs the benefits to be anticipated, the state regulation will fall even where there has been an otherwise valid exercise of the state police power.

But where the local regulation not only lays a heavy burden on interstate commerce but discriminates as well against out-of-state interests, then the state has the obligation to demonstrate that no reasonable alternative is available. *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349, 354 (1951).

How likely is Section 9 to bring about the desired benefits? Does it permit "fundamental principles of price competition"? or "forestall possible monopolistic and anticompetitive practices"?

If it grinds the New York wholesaler between the pestle of the "lowest of the low" and the mortar of his own hard costs, will it benefit the retailer? Is this a sufficient benefit to outweigh the burden?

Is it so clear that the consumer will benefit? Is a somewhat cheaper retail price for a bottle of liquor in New York, a suitable counterweight for a clog on commerce?

Assume that the retail price level in New York may weaken somewhat: does Sec. 9 burden commerce? Does any burden discriminate against out-of-state interests? There is first, of course, the sheer difficulty, to say nothing of the expense, of compliance. As to the effect on prices, particularly at the wholesale level, there are several possibilities:

(1) Prices elsewhere will rise to prevailing New York levels. In that event, the rest of the country may well complain even if the majority of the Court of Appeals is unconcerned by the prospect.

(2) Wholesale prices in New York will be forced down to the more or less arbitrary level obtaining in some different market — in which case the statute discriminates against the smaller New York wholesaler. With the small profit margins prevailing, he may well be forced out of business, which deprives out-of-state distillers of a possible distributor.

(3) Both tendencies may appear, as efforts are made to offset the worst impact of the statute. In that event, the hoped-for benefit will be diminished, *pro tanto*.

The majority of the Court of Appeals holds that the no higher-than-the-lowest provision is on an equal footing with tying the price to a national index based either on the average price for the commodity or on some cost-of-living formula. To the majority of the Court of Appeals, it is all one.

The analogy is apt only insofar as it illustrates that the no-higher-than-the-lowest price elsewhere is essentially a resort to a national approach, a solution which

might more properly come from a national legislature. But there, appellants believe, the analogy stops. Surely, compelling a businessman to sell at the lowest price quoted by some other businessman anywhere else, is not the equivalent of selling at an average price.

The impact of the amendment is, to a degree, speculative. But the majority of the Court of Appeals was fully prepared to speculate: to them the fact that the amendment might result in a general increase in prices across the country was simply not relevant to the constitutionality of the amendment:

> "Under section 9 the distillers themselves control the base price since they fix the lowest price elsewhere. If its effect on New York is too low a price they have it within their power to raise the lowest price elsewhere. The industry must absorb any differential cost in doing business as one of the incidents to a highly regulated industry. The incidental effect of this on prices in another State does not invalidate the New York statute." (R. at 347.)

It is difficult to imagine any more far reaching exegesis of state police power than this, a classic statement that the tail should be free to wag the dog. But if the tail wags the dog, it remains — for the majority of the Court of Appeals and appellees — the tail and, therefore, the effect on commerce must be, by definition, only incidental. If this reasoning is upheld, future judicial inquiry into burden v. benefit under the commerce clause is, as a practical matter, foreclosed.

It will be noted that section 9 does not "bite" except where a brand is sold in New York and in some other state also. A brand, be it advertised or private label, is quite untouched by Section 9 if its sales are confined to

New York. Does this suggest a non-discriminatory solution to a local problem, affecting interstate and intrastate interests equally, or does it smack a little of provincial favoritism?

If, as appellants believe, this regulation embodies — directly and indirectly — serious discrimination against out-of-state interests (by definition without representation in the New York legislature), has the state sustained the burden of demonstrating no reasonable alternative which would be less discriminatory and burdensome?*

To appellees' contention that the burden and the discrimination are only speculative, it may be replied, again, that the benefits to be anticipated are, if anything, even more speculative.

Appellants concede that where the nature of the beast and congressional inaction, point to the desirability of permitting the states to experiment with local solutions to local problems, the result may be a valid exercise of the police power, and the statute will not fall because there is some incidental effect on interstate commerce. But here any purely local approach has been abandoned. The unique aspect of this case — stated in broadest terms —

* There have, indeed, been confrontations between segments of the liquor industry and the Antitrust Division of the Justice Department—over problems of size, pricing tactics by a distiller and its distributors, by groups of distributors, and a merger. The Federal Trade Commission, for its part, is not entirely unfamiliar with the industry. The history of antitrust litigation involving the distilled spirits industry, under both federal and parallel state statutes, while not so well developed as is the case in many other industries, is still mature enough to demonstrate that statutes of general applicability have served to cope with anticompetitive problems as they have arisen. There is no suggestion that the injunctive relief which has been decreed has proven ineffective. Should anticompetitive practices occur anew, there is no basis for assuming that antitrust prosecution would be an idle gesture.